Dato' Othman bin Hashim v KKW Auto Centre

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–61 OF 2008
LAU BEE LAN J
20 AUGUST 2012

Insurance — Motor insurance — Subrogation — Plaintiff's insurer filed claim in plaintiff's name — Plaintiff's vehicle involved in accident while in defendant's possession — Accident occurred while car driven from defendant's workshop to another workshop ('PTTC') — Employee of PTTC driving car at material time — Whether plaintiff had instructed, permitted, consented and authorised PTTC to carry out repairs — Whether driver deemed to be insured under policy of insurance — Whether insurer entitled to subrogation — Whether plaintiff as hirer had valid claim against defendant — Whether plaintiff's claim void for being in contravention of law — Whether plaintiff had proven negligence of defendant — Counterclaim — Whether proven — Road Transport Act 1987 s 17(1)(b)

On 6 August 2007, the plaintiff, the owner of a Porsche 911 motocar ('the vehicle'), had sent his car to the defendant's workshop for repairs. On 8 August 2007, while the vehicle was in the possession of the defendant it was involved in an accident. According to the defendant, the vehicle was being taken from the defendant's workshop to another workshop, namely Perkhidmatan Tayar Teik Chan ('PTTC'), when the accident occurred. The person driving the vehicle at the material time was one Wong Jun Kit ('Wong'), a part-time worker with PTTC. As the plaintiff was at all material times a Takaful Ikhlas Sdn Bhd ('insurer') policy holder, the insurer claimed it was entitled to subrogation. Thus, the present claim against the defendant was filed by the insurer in the name of the plaintiff. It was the plaintiff's case that the defendant was liable for the damage to the vehicle. Thus, by way of this action the plaintiff claimed, inter alia, RM430,000 as the alleged market value of the vehicle, for loss of use of the vehicle at RM300 a day from the date of the accident, for the insurance premium costs of RM4,984 and for a refund of the deposit of RM32,228 paid to the defendant. In its defence the defendant admitted that it had received the sum of RM32,228 from the plaintiff as part payment for repair works but put the plaintiff to strict proof in respect of all the other allegations. The defendant claimed that it sent all its vehicles which required wheel alignment, balancing, suspension and tyre change to PTTC and that in the present case one of its employees ('Chin') together with Wong had taken the vehicle for a test drive in order to carry out the alignment, balancing and testing of noises on the vehicle. According to the testimony of Wong, when he was invited by Chin to test drive the vehicle he was only a passenger in the vehicle. However, Wong testified that it became necessary for him to drive the car so that Chin could look out for the

noise. Wong's evidence was supported by Chin, who had lodged a police report to this effect. The defendant further submitted that the plaintiff had on prior occasions consented and authorised PTTC to carry out the alignment, balancing and testing of noises on the vehicle. However, the plaintiff submitted that he had not authorised anyone other than the defendant to drive the vehicle and that he had not instructed the defendant to send the vehicle to PTTC to carry out the testing and repair of the vehicle. The defendant further claimed that although at the material time the vehicle was under hire purchase from Hong Leong Bank Bhd ('HLB') and the plaintiff was the hirer, the plaintiff had never pleaded this fact. The defendant then went on to counterclaim a sum of RM16,453.70 against the plaintiff for outstanding repair works.

Held, dismissing the plaintiff's claim with costs to be taxed or agreed and allowing the defendant's counterclaim with costs to be taxed or agreed:

(1) When the evidence of Wong, Chin, the other witnesses for the defendant as well as the documentary evidence was tested against the plaintiff's case, it led to the irresistible conclusion that the plaintiff had instructed, permitted, consented and authorised PTTC to carry out the alignment, balancing and testing of the noises. Further, from the evidence it was apparent that the plaintiff had sent all his cars to PTTC for balancing, alignment, suspension and tyre change (see paras 11–12).

(2) Clause 5 of the insurance policy provided that the policy covered the participant and 'any other person who was driving on the participant's order or with his permission'. This court found that Wong, who was driving the vehicle at the material time of the accident, was covered by cl 5. As such he was deemed to be an insured and the insurer would not be entitled to subrogation (see para 13).

(3) The plaintiff as the hirer had an insurable interest in law. However, since there was an endorsement by HLB in the insurance policy, the bank would have co-extensive rights as against the insured. Further, the plaintiff being only the hirer was in law a person who had possession and use of the vehicle but was not the legal owner. The evidence showed that whilst the plaintiff had subrogated all his rights to the insurer there was no document or discharge by HLB releasing the plaintiff of all liability (see paras 14–16).

(4) The certificate of insurance by the insurer had a 'Road Transport Act 1967' endorsement on it. Based on the evidence adduced it was clear that the plaintiff had failed to comply with the requirement of s 17(1)(b) of the Road Transport Act whereby the engine number of the vehicle had to be identical with the corresponding particulars in the registration certificate. This meant that the plaintiff's claim, which was in contravention of the law, ought not to be entertained (see para 17 & 19).

(5) Based on the evidence of the defendant's witnesses and their police reports, the plaintiff had not proven on a balance of probabilities that the defendant was negligent. In fact none of the plaintiff's claims could be allowed for lack of proof (see paras 22–23).

(6) The breakdown of the defendant's statement of accounts showed that a balance of RM16,453.70 was still owing from the plaintiff to the defendant. Based on the documentary evidence, the plaintiff had made several payments without any complaints and was now estopped from disputing the invoices (see para 24).

[Bahasa Malaysia summary

Pada 6 Ogos 2007, plaintif, pemilik Porsche 911 kereta ('kenderaan'), telah menghantar keretanya ke bengkel defendan untuk dibaiki. Pada 8 Ogos 2007, semasa kenderaan tersebut berada dalam milikan defendan ia telah terlibat dalam kemalangan. Menurut defendan, ketika kemalangan tersebut berlaku, kenderaan tersebut sedang dibawa dari bengkel defendan ke bengkel lain, iaitu Perkhidmatan Tayar Teik Chan ('PTTC'). Orang yang memandu kenderaan pada masa material adalah Wong Jun Kit ('Wong'), seorang pekerja sambilan PTTC. Memandangkan plaintif adalah pada semua masa material pemegang polisi Takaful Ikhlas Sdn Bhd ('syarikat insurans'), syarikat insurans mendakwa ia berhak untuk subrogasi. Oleh itu, tuntutan semasa terhadap defendan telah difailkan oleh penanggung insurans atas nama plaintif. Adalah menjadi kes plaintif bahawa defendan bertanggungjawab bagi kerosakan terhadap kenderaan. Oleh itu, melalui tindakan ini, plaintif menuntut, antara lain, RM430,000 sebagai nilai pasaran kenderaan tersebut, kehilangan penggunaan kenderaan sebanyak RM300 sehari, bermula dari tarikh kemalangan, kos premium insurans RM4,984 dan bayaran balik deposit sebanyak RM32,228 yang dibayar kepada defendan. Dalam pembelaannya defendan mengakui bahawa ia telah menerima sejumlah RM32,228 daripada plaintif sebagai sebahagian daripada bayaran bagi kerja-kerja pembaikan tetapi meletakkan pembuktian ketat ke atas plaintif bagi dakwaan-dakwaan lain. Defendan mendakwa bahawa ia menghantar semua kenderaan yang memerlukan penjajaran, keseimbangan, dan sistem gantungan (suspension) serta penukaran tayar kepada PTTC dan bahawa dalam kes ini salah seorang pekerjanya ('Chin') bersama-sama dengan Wong telah mengambil kenderaan untuk memandu ujinya untuk melihat penjajaran, pengimbangan dan menguji bunyi pada kenderaan. Menurut Wong, apabila dia telah diajak oleh Chin untuk memandu uji kenderaan tersebut, dia cuma penumpang dalam kenderaan tersebut. Walau bagaimanapun, Wong memberi keterangan bahawa adalah perlu baginya untuk memandu kereta tersebut supaya Chin boleh mencari bunyi bising tersebut. Keterangan Wong telah disokong oleh Chin, yang telah membuat laporan polis bagi tujuan ini. Defendan seterusnya menghujahkan bahawa plaintif telah, pada masa-masa terdahulu bersetuju, dan diberi kuasa oleh PTTC untuk menjalankan penjajaran, pengimbangan dan menguji bunyi

pada kenderaan. Walau bagaimanapun, plaintif menghujahkan bahawa dia tidak membenarkan sesiapa selain daripada defendan untuk memandu kenderaan tersebut dan bahawa dia tidak pernah mengarahkan defendan untuk menghantar kenderaannya ke PTTC untuk menjalankan ujian dan pembaikan kenderaan. Defendan juga mendakwa bahawa walaupun pada masa material kenderaan adalah di bawah sewa beli dari Hong Leong Bank Bhd ('HLB') dan plaintif adalah penyewa, plaintif tidak pernah memplidkan fakta. Defendan kemudiannya menuntut balas jumlah sebanyak RM16,453,70 terhadap plaintif bagi kerja-kerja pembaikan yang masih belum selesai.

Diputuskan, menolak tuntutan plaintif dengan kos ditetapkan atau dipersetujui dan membenarkan tuntutan balas defendan dengan kos ditetapkan atau dipersetujui:

(1) Apabila keterangan Wong, Chin, saksi-saksi lain untuk defendan serta keterangan dokumentar telah diuji terhadap kes plaintif, ia membawa kepada kesimpulan yang bahawa plaintif telah mengarahkan, membenarkan, bersetuju dan memberi kuasa PTTC untuk menjalankan penjajaran, pengimbangan dan ujian bunyi. Seterusnya, berdasarkan keterangan, adalah jelas bahawa plaintif telah menghantar semua keretanya ke PTTC untuk pengimbangan, penjajaran, penggantungan dan penukaran tayar (lihat perenggan 11–12).

(2) Klausa 5 polisi insurans memperuntukkan bahawa polisi meliputi peserta dan 'any other person who was driving on the participant's order or with his permission'. Mahkamah ini mendapati bahawa Wong, yang telah memandu kenderaan pada masa material kemalangan, dilindungi oleh klausa 5. Oleh itu dia telah disifatkan sebagai yang diinsuranskan dan syarikat insurans tidak akan berhak untuk subrogasi (lihat perenggan 13).

(3) Plaintif sebagai penyewa mempunyai kepentingan boleh insurans di bawah undang-undang. Walau bagaimanapun, kerana terdapat pengesahan oleh HLB dalam polisi insurans, bank akan mempunyai hak bersama seperti yang diinsuranskan. Selanjutnya, plaintif sebagai penyewa adalah dari segi undang-undang orang yang mempunyai milikan dan penggunaan kenderaan tetapi bukan pemilik di sisi undang-undang. Bukti-bukti menunjukkan bahawa semasa plaintif subrogasi semua haknya kepada penginsurans, tidak ada dokumen atau pelepasan oleh HLB yang melepaskan plaintif daripada semua liabiliti (lihat perenggan 14–16).

(4) Perakuan insurans oleh syarikat insurans mempunyai pengendorsan 'Akta Pengangkutan Jalan 1967' di atasnya. Berdasarkan keterangan yang dikemukakan, adalah jelas bahawa plaintif telah gagal untuk mematuhi keperluan s 17(1)(b) Akta Pengangkutan Jalan di mana nombor enjin kenderaan mestilah sama dengan butir-butir dalam pendaftaran sijil. Ini

bermakna bahawa tuntutan plaintif, yang melanggar undang-undang, tidak patut dilayan (lihat perenggan 17 & 19)

(5) Berdasarkan keterangan saksi-saksi defendan dan laporan polis mereka, plaintif tidak membuktikan atas imbangan kebarangkalian bahawa defendan telah cuai. Malah tiada satupun tuntutan plaintif yang boleh dibenarkan kerana kekurangan bukti (lihat perenggan 22–23).

(6) Pecahan penyata akaun defendan menunjukkan bahawa kira-kira RM16,453,70 masih dihutang daripada plaintif kepada defendan. Berdasarkan bukti dokumentar, plaintif telah membuat beberapa pembayaran tanpa sebarang aduan dan kini diestop daripada mempertikaikan invois tersebut (lihat perenggan 24).]

Notes

For cases on subrogation, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 405–412.

Cases referred to

Asia Insurance Co Ltd v American International Assurance Co Ltd [1953] 1 MLJ 87 (refd)
Boustead Trading(1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Boyle v Wright [1969] VR 699, SC (refd)
Brogden v Metropolitan Railway Company [1877] Vol II 666, HL (refd)
China Insurance Co Ltd v Ang Bay Kang [1969] 1 MLJ 142, FC (refd)
Credit Corporationn (M) Bhd v The Malaysia Industrial Finance Corp & Anor [1976] 1 MLJ 83 (refd)
Digby v General Accident Fire and Life Assurance Corp, Ltd [1942] All ER 319, HL (refd)
Eckhardt Marine GMBH v Sheriff High Court of Malaya, Seremban & Ors [2001] 4 MLJ 49; [2001] 3 CLJ 864, CA (refd)
Malaysian Australian Finance Co Ltd v The Law Union & Rock Insurance Co Ltd [1972] 2 MLJ 10, HC (refd)
Manap bin Mat v General Accident Fire & Life Assurance Corporation Ltd. [1971] 1 MLJ 134, CA (refd)
People's Insurance Co Ltd v Khoo Tiang Seng [1966] 1 MLJ 281, FC (refd)
Sajan Singh v Sardara Ali [1960] 1 MLJ 52, PC (distd)
Yong Moi & Anor v The Asia Insurance Co Ltd [1964] MLJ 307, FC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Hire Purchase Act 1967 ss 2, 26(1)(a)
Road Transport Act 1987 ss 17(1)(b), 41(1)

R Saravanha (Tan Lee Kiat with him) (Othman Hashim & Co) for the plaintiff.

Ravin Woodhull (Tan Kim Soon and P Arudkumaran with him) (Tan Kim Soon & Co) for the defendant.

Lau Bee Lan J:

[1] In this action against the defendant, KKW Auto Centre, the insurer, Takaful Ikhlas Sdn Bhd, has under the doctrine of subrogation brought the claim in the name of the plaintiff, Dato' Othman bin Hashim ('PW4') for the following reliefs:

(a) RM430,000.00 sebagai nilai pasaran ('market value') kereta tersebut yang kini dianggap dan/atau diiktirafkan sebagai 'total loss' (yang termasuk jumlah RM180,000.00 yang ditanggungrugi oleh Takaful Ikhlas);

(b) Kehilangan kegunaan kereta tersebut pada kadar RM300.00 sehari dari tarikh kemalangan tersebut sehingga penyelesaian penuh oleh Defendan;

(c) Kos menunda ('towing cost') kereta tersebut berjumlah RM1,500.00;

(d) Kos premium insurans kereta tersebut sebanyak RM4,984.50;

(e) Kos cukai jalan kereta tersebut sebanyak RM4,845.00;

(f) Gantirugi untuk ketidakselesaan ('inconvenience'), kebimbangan ('anxiety') dan kejutan keras/saraf ('severe/nervous shock');

(g) Wang yang telah dibayar kepada Defendan sebagai deposit dan/atau untuk tujuan kerja-kerja pembaikan kereta tersebut sebanyak RM32,228.00;

(h) Gantirugi Teladan untuk ditaksirkan oleh Mahkamah Yang Mulia ini;

(i) Faedah pada kadar 8% setahun untuk kesemua tuntutan dari tarikh pemfailan saman sehingga tarikh penyelesaian penuh oleh Defendan;

(j) Kos tindakan ini; dan

(k) Lain-lain relif yang Mahkamah Yang Mulia ini anggap suai dan manfaat.

(Paragraph 17 of the amended writ of summons and statement of claim dated 3 August 2011.)

[2] The plaintiff has also pleaded that the defendant is the bailee of the plaintiff's car and the existence of a contract of bailment (para 11 of the amended writ of summons and statement of claim).

[3] The plaintiff's action arose in this manner. It is undisputed:

(a) the plaintiff is a Takaful Ikhlas Sdn Bhd policy holder No HOF251MT07112222 for the period 23 February 2007–22 February 2008 in respect of a Porsche 911 Carrera (A) bearing registration No BHT2933 ('the Takaful insurance policy'); and

(b) on 6 August 2007 the plaintiff sent the said vehicle to the defendant for repair works and on 8 August 2007 at about 12.30am the said vehicle was involved in an accident.

[4] The defendant in its statement of defence basically pleaded as follows.

[5] In the month of April 2007, the plaintiff had instructed the defendant to give him a quotation to repair the power steering of the said vehicle but when the plaintiff found the quotation to be too high, he instructed the defendant to change the engine (paras 3 and 4.1).

[6] The said vehicle was left at the defendant's workshop to carry out repair works and change of engine from 19 April 2007–4 June 2007 and from 18 June 2007–3 August 2007, the said vehicle was sent again to the defendant's workshop for other repairs (paras 3, 4.1 and 4.2).

[7] On 6 August 2007 the plaintiff sent the said vehicle to the defendant's workshop to check the 'front suspension'. The plaintiff knew fully that for purposes of checking the 'front suspension and alignment', the said vehicle had to be sent to another workshop. On 7 August 2007, the defendant sent the said vehicle to 'Bengkel Perkhidmatan Tayar Teik Chan' for the said checking (paras 3, 4.3 and 4.4).

[8] The defendant admitted that they received the sum of RM32,228 from the plaintiff as part payment for repair works carried out by the defendant from 19 April 2007–4 June 2007. In respect of the other claims the defendant put the plaintiff to strict proof (paras 5, 6, 9, 10, 11, 12, 13, 14 and 16).

[9] The defendant denies that the plaintiff has any cause of action against the defendant and/or the plaintiff's action is an abuse of the court's process (para 15).

[10] The defendant has a counterclaim of RM16,453.70 against the plaintiff for outstanding repair works.

[11] The court has considered the plaintiff's written submission dated 19 October 2011 (encl J), the defendant's skeletal submission of 18 October 2011 (encl L) and the plaintiff's reply to the defendant's submission (undated) (encl M) and the accompanying bundle of authorities. The court's findings are discussed below.

[12] The issues to be tried are:

(a) whether the insurer is entitled to subrogation?;

(b) whether the plaintiff being the hirer and the insurer stepping into the shoes of a hirer has a valid claim against the defendant?;

(c) whether the plaintiff's claim is void for being in contravention of the law;

(d) even if the defendant is not covered under the Takaful insurance policy, has the defendant discharged the burden of not being negligent?

(e) whether the plaintiff has sufficiently adduced evidence to prove his claim?; and

(f) whether the defendant has adduced evidence to prove its counterclaim.

FINDINGS OF THE COURT

Whether the said insurer is entitled to subrogation

[13] Based on the Takaful insurance policy, comprising the Schedule and the certificate of Takaful (exh P6, bundle B pp 4–5 respectively) and the certificate for Motor Takaful (private car) (exh P6A), under cl 5(b) (bundle B p 5), under the heading of 'Persons or Classes of Persons entitled to drive, the persons covered are:

(a) The Participant;

(b) Any other person who is driving on the *Participant's order* or with their *permission*'. (Emphasis added.)

[14] In respect of this issue, essentially the defendant submits that based on the evidence and pleadings, the plaintiff had on previous occasions, prior dealings, previous conduct, relationship and knowledge had requested, permitted, consented and authorised Perkhidmatan Tayar Teik Chan to carry out the alignment, balancing and testing of noises on the said vehicle.

[15] The plaintiff however submits that (i) he did not authorise anyone other than KKW Auto to drive the said vehicle and (ii) he has never instructed the said vehicle to be sent to Perkhidmatan Tayar Teik Chan.

[16] Wong Jun Kit ('DW2'), a part-time worker with Perkhidmatan Tayar Teik Chan who lodged a police report (exh D12) testified at about 11.30pm on 7 August 2007, he was invited by Chin Wai Keong ('DW3') who wanted to test drive the said vehicle for alignment and tyre balancing and he was a passenger then. However due to a noise which Chin Wai Keong wanted to verify, he was asked to drive the said vehicle. In cross-examination (i) DW2 explained there was a need for three persons in order to test drive as the said vehicle, a Porsche,

had its engine at the rear, hence the need for one person at the front and the other at the rear to look out for the noise, (ii) it was necessary to test drive for the wheel balancing and alignment as the latter is manually done; (iii) he drove at about 70–80 km per hour. DW2 testified that he had seen the plaintiff with Chin Wai Keong, his boss and the owner of KKW Auto.

[17] The evidence of DW2 is supported by Chin Wai Keong (DW3), who lodged a police report (exh D13) and testified at about 11.30pm on 7 August 2007, he drove the said vehicle for a test drive, wheel alignment and balancing and whether there were any noises made by the said vehicle. DW2 stated whilst test driving he heard a noise and he had asked DW2, his worker to drive whilst he tried to detect for the noise and the accident occurred.

[18] DW3, testified that KKW Auto would sent all vehicles which require wheel alignment, balancing, suspension and tyre change to Perkhidmatan Tayar Teik Chan and in this instant case, the said vehicle was sent to the latter for wheel alignment, balancing and the checking of noise upon the plaintiff's instruction and it was Wong Kok Keong of KKW Auto who sent the said vehicle to Perkhidmatan Tayar Teik Chan.

[19] DW3 further testified (i) that he knew the plaintiff and that the said vehicle belonged to the plaintiff and apart from the said vehicle he had done wheel balancing and alignment for the plaintiff's other cars; and (ii) this is confirmed by the repair bills (exhs D14–D16 in bundle B pp 20, 34 and 38 respectively) from Perkhidmatan Tayar Teik Chan to KKW Auto for the plaintiff's cars which were signed by him; (iii) he informed that at times the plaintiff would pay for the bills to Perkhidmatan Tayar Teik Chan directly or sometimes the plaintiff's driver or KKW Auto would pay Perkhidmatan Tayar Teik Chan for the services.

[20] He estimated DW2 was driving at a speed between 70–80 km per hour. He appeared astonished when it was put to him in cross-examination that DW2 and Chong Wai Hon were not working for him.

[21] Madam Kek Booi Choo ('DW4'), the administration and accounts supervisor at KKW Auto, testified that (i) exh D18 (1–22), exhs D14–D16 were the receipts and payments made by the plaintiff in respect of the plaintiff's girlfriend's car (WEP 18) which was driven by the plaintiff's driver to Perkhidmatan Tayar Teik Chan for tyre change, the plaintiff's car bearing same registration No WEP 18 but of a different make and the plaintiff's Mercedes Benz No WKV188 respectively; (ii) she confirmed in respect of exhs D14–D16 she made the cash payment to Perkhidmatan Tayar Teik Chan.

[22] Mr Wong Kok Keong ('DW5'), husband of DW4 is the sole proprietor

of KKW Auto which he established about 1998–1999. He testified that his business involved the repairs of all continental cars (luxury cars) except alignment and suspension. He testified he has known the plaintiff for a long time and the plaintiff sent many other vehicles to his workshop for repairs including the said vehicle, namely:

> Satu kereta Volvo 940GL nombor pendaftaran WDH 349 dimiliki oleh Rosman Bin Abu Bakar (Bapa Angkat Dato Othman Hashim), satu Mercedes Benz E200-211 nombor pendaftaran WMA 818 dimiliki oleh Jamilah Binti Hashim (Isteri Dato Othman Hashim), satu Mercedes Benz C180K(A) nombor pendaftaran WKV 188 dimiliki oleh Maimunah Binti Mohamed (bukan Isteri Dato, saya ingat girlfriend dia) dan ada satu iagi Mercedes Benz S320-140 nombor pendaftaran WEP 18. Kemudian nombor pendaftaran Mercedes Benz iaitu WEP 18 ditukar kepada satu lagi kereta Toyota Harrier dan selepas itu ditukar kepada kereta Porsche 911(A) warna putih.

[23] DW5 related how the said vehicle was brought to his workshop and thereafter to Perkhidmatan Tayar Teik Chan in the following manner:

> J: Mula-mula, Dato bawa kereta untuk dibaiki ke kedai saya pada 19.4.2007 dan sehingga 4.6.2007 kereta itu ada di kedai saya. Selepas enjin kereta tersebut habis siap ditukar, Dato datang ke kedai saya dan setelah beri dua cek lewat iaitu cek No MBB 249041 dan MBB 249069, Dato telah pandu balik kereta tersebut Kemudian pada 18.6.2007 Dato pandu kereta tersebut ke kedai saya dan minta saya baiki kereta tersebut lagi. Dari 18.6.2007 hingga 3.8.2007 kereta itu ada di kedai saya.
>
> J: Pada 3.8.2007 selepas kereta Porsche BHT 2933 siap dibaiki, Dato telah membuat bayaran melalui cek No MBB 286688 dan telah pandu balik kereta tersebut.

[24] It is significant to note that DVV5 had lodged a police report as far back as 8 August 2007 which basically corresponds with his oral testimony.

[25] With respect to the engine change to the said vehicle, DVV5 testified the plaintiff requested him to change the engine as:

> A: Sebab keadaan engine asal No 63T51878 (original) sangat teruk dan harganya mahal kalau mahu repair (membaikinya).
>
> A: Minyak engine bocor, minyak enjin keluar banyak asap putih, oil seal dan oil ring bocor, gasket bocor dan piston ring bocor dan keadaan engine sangat teruk.

[26] In relation to the repairs works, the plaintiff in *examination-in-chief* stated:

(a)

> A: Actually I sent the car to KK Auto especially to Mr Keong to do an

overhaul of engine of my car. It took quite a long time. When Mr Keong opened up the engine we found out that even if we were to repair, *the problem of knocking sound and the power will not be up to what I want As such we had a discussion and Mr Keong recommended why not we replaced the engine.*

I agreed. I bought the engine from Mr Keong's friend. We had it installed in my car.

Finally 1 day before 6.8.2007 the car was delivered to me. I test drive it around my area. I found engine is still not to my satisfaction. *There was problem with alignment and balancing of the car.*

Then the next day in the evening I sent back car to Mr Keong telling him *to rectify the engine problem — some tuning and balancing and alignment of the car.* I left the car with that instruction and I will wait for him to call me whether car was ready for pick-up. (Emphasis added.)

(b)

Q: Did you on 6.8.2007 instruct KKW Auto to send car to 3rd party — Teik Chan Tyres?

A: NO.

(c)

(i) In his prior dealings with KKW Auto, once he received his car back, he paid to KKW Auto;

(ii) in his dealings with KKW Auto, he has never issued any payment to Teck Chan Tyres; and

(iii) right up to the time of being informed of the accident on 8 August 2007, in his understanding, the car was in the possession of KKW Auto.

[27] In *cross-examination* the plaintiff confirmed or agreed:

(a) his pleadings at pp 5–10 of the statement of claim was filed on 16 January 2008;

(b) the documents in bundle B according to the court's endorsement was 29 October 2010;

(c) the amended writ of summons and statement of claim ('amended statement of claim') was filed on 3 August 2010;

(d) at the time of the filing of the amended statement of claim, DW5, Wong Kok Keong's police report (exh D21 dated 8 August 2007) was already filed in bundle B and was with the plaintiff;

(e) that there was no averment in the statement of claim that he did not authorise and consented for Perkhidmatan Tayar Teik Chan to carry on the testing and repair of the said vehicle;

(f) there was no specific denial of the defendant's defence that he had instructed KKW Auto to send the said vehicle to Perkhidmatan Tayar Teik Chan but instead the plaintiff wanted the defendant to prove that he had instructed KKW Auto to send the car to Perkhidmatan Tayar Teik Chan;

(g) that he had exh D21 with him before filing the amended statement of claim but yet said there was no reason for him to lodge a report that he had never authorised or consented Perkhidmatan Tayar Teik Chan to carry out the checking for noises and repair on wheel alignment;

(h) that he filed the amended statement of claim despite having knowledge of exh P6, particularly, cl 5(b) of the insurance policy that he as the insured is covered under items 1(a)–(h) exh P6A;

(i) that the plaintiff's claim in subrogation is in respect of negligence and there is no averment for unauthorised use of the said vehicle by Perkhidmatan Tayar Teik Chan; that the said vehicle was under hire purchase from Hong Leong Bank Bhd based on exh P6 (bundle B p 4);

(j) that the endorsements on exh P7, car registration card showed 'Hakmilik dituntut oleh Hong Leong Bank Bhd, Hong Leong Finance and Eon Bank Bhd' (bundle B pp 6–7);

(k) that he has not filed the hire purchase agreement in respect of the said vehicle;

(l) that there is no document in the bundle of documents filed to show that he had bought the said vehicle from Min Heng Motor for RM230,000;

(m) that there was an engine change about less than 1 1/2 years after he purchased the said vehicle (the period from 26 June 2006–June 2007);

(n) that he changed the engine despite the low mileage;

(o) that exhs P6–P7 did not reflect any change of endorsement of an engine change and was not pleaded in the amended statement of claim;

(p) that based on exh P3, he was subrogating his rights to Takaful Sdn Bhd but there were no documents that Hong Leong Bank Bhd was discharging him from any liability or releasing him as a hirer and he agreed that under the hire purchase agreement with Hong Leong Bank Bhd which was not filed, he was only the hirer and not the owner;

(q) based on exh P3, a person called Zuraidah bte Atan signed on behalf of EON Bank Bhd;

(r) that exh P3 did not state that the monies were paid to Hong Leong Bank Bhd;

(s) that in the pleadings the plaintiff has not pleaded that he is the hirer and the owner is Hong Leong Bank Bhd;

(t) that the plaintiff has not joined Hong Leong Bank Bhd as a party to the action;

(u) that there was nothing on exh P3 to show Hong Leong Bank Bhd had received money from Takaful;

(v) as at 23 August 2007 (exh P4, bundle B pp 17–18), a letter from the plaintiff in respect of his claim to M/s Tan Kim Soon, he said that he knew that the said vehicle was a total loss, a collector's item and for the said model, a rare item, and the market value was RM430,000;

(w) that there was no medical report for his claim of severe shock;

(x) that the value stated in the adjustor's report dated 10 March 2008 (exh P5, bundle C pp 4–5) is RM250,000 although stating that was the second hand dealer's value but he has no document to show the market value is RM430,000;

(y) that he has no receipts for claim in respect of loss of use of car at RM300 per day from the date of accident till full settlement by the defendant (para 17b) and for towing charges of RM1,500 (para 17c);

(z) agreed that he insured the said vehicle for RM180,000 despite his claim for RM430,000;

(aa) based on items 1–2 of bills pp 1–2 bundle E (exh D17A–B), when it was put to him, the plaintiff agreed that the engine was changed as 'empty engine — used engine no: 63T-51506'. It is to be noted the plaintiff admitted two times that the engine *was already changed* when it was put to him;

(ab) when referred to the receipts in bundle E pp 7–9 of RM10,000, RM5,000 and RM9,000, the plaintiff agreed that the payment was for engine change ie RM21,000 and part are for repairs; and

(ac) agreed that as a director of Takaful there was no written letter disclosing his direct or indirect interest of a personal claim to Takaful.

[28] The plaintiff disagreed that his claim for RM32,228 (para 17g) is a double claim since he was claiming for total loss as he did not have the car as he had paid for the engine and repair but ended up with nothing.

[29] In re-examination, the plaintiff testified the engine was installed; he test drove, was not happy with the performance, the alignment and balancing and the said vehicle was sent to KKW Auto for further repairs and enhancement.

[30] When asked to explain what he said in cross-examination 'It was in the process of change' besides admitting also that the engine *was already changed* when it was put to him, the plaintiff explained:

> When the mechanic and I decided to change the engine, we decided to purchase one engine and to install it. Procedure once engine was installed you have to take it to PUSPAKOM for inspection and road worthiness of the car. Only then you are allowed car to be on the road. Upon completion of this, then only inform insurance that you change. Before I could do this, when the car was taken for a ride and got involved in an accident.
>
> He was referred to Bundle B pp 4–7 (exh P6) and asked 'No engine, no change in the document and you agreed. Explain why there is no change', he responded, A: Because I have not completed the process of installing the engine and bringing to PUSPAKOM for inspection and approval. Upon getting that you inform insurance company of the change and will be endorsed in the policy and the grant. After going to PUSPAKOM, you have to go to JPJ to get the engine number which have been changed on the grant. Then you inform insurance company only then you can drive on the road.

[31] Essentially, in re-examination the plaintiff took the position that the engine was in the process of change. If the court is to accept this as the truth it begs the question as to why Takaful paid the plaintiff RM179,600 based on the engine No 63T51878 (exh P6) whereas the engine which was installed based on bill (exh D17B at bundle E p 2 item2) was 63T-51506. The plaintiff agreed that the engine no was different.

[32] In my judgment the explanation given by the plaintiff is not plausible in the light of the evidence from Encik Zazali Mohd Yatim (PW2), the assistant vice-president, Claims Department at Takaful Ikhlas Sdn Bhd who agreed — (i) that there was no endorsement in the Jabatan Pengangkutan Jalan registration card (exh P7) or the policy schedule (exh P6) of any engine change in respect of the said vehicle; (ii) that there was no notification in writing by the plaintiff to Takaful Ikhlas that the engine of the said vehicle was changed; (iii) that Takaful Ikhlas approved the plaintiff's own claim for RM179,600,000 (RM180,000 less RM400) (exh P2, bundle Cp 1) based on EP Ong's recommendation report (exh PS, bundle C pp 4–6) with the *engine No 63T51578*; (iv) there was no joint inspection carried out by PW2 and Mr Ong to verify the particulars of the said vehicle; (v) there were no photographs in respect of the engine and chassis no. in respect of the said vehicle; and (vi) it was incumbent for the insured to state the truthful contents of the insurance policy as in the engine and chassis no.

[33] Another salient point to be noted in this instant case, as correctly highlighted by Mr Ravin, the lead counsel for the defendant, is the difficulty posed as to how is the court to assess the damages when the insured property

has been divided ie how is the court to assess the chassis and the engine separately? My answer to that is the court cannot value and therefore the claim of the plaintiff cannot be sustained.

[34] I find the evidence of DW2–DW5 and the documentary evidence which have been referred when tested against the plaintiff's case, on a balance of probabilities point to the irresistible conclusion that the plaintiff had instructed, permitted, consented and authorised Perkhidmatan Tayar Teik Chan to carry out the alignment, balancing and testing of the noises.

[35] Further from the evidence it is apparent that the plaintiff had by his prior conduct and relationship had in fact sent all his cars to Perkhidmatan Tayar Teik Chan for balancing, alignment, suspension and tyre change.

[36] With respect to learned counsel for the plaintiff, I am of the view that the following cases are relevant to support the defendant's case:

(a) *People's Insurance Co Ltd v Khoo Tiang Seng* [1966] 1 MLJ 281 where as per the headnotes:

> The respondent who was injured in a road accident due to the negligent driving by one Chua Ou Chye of a motor car SP 5034 and had obtained an unsatisfied judgment against him for damages sued the appellants, the insurers of the motor car, by virtue of s 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Ordinance 1960.
>
> The appellants had issued a policy covering third party risks in respect of the car in the name of Yew Seng & Co, of which a Mr Ah Bah was the proprietor, as the insured. The policy contained a clause of a common type whereby the insurers undertook to indemnify any 'authorised driver' driving the motor vehicle and the policy defined 'authorised driver' to include any licensed driver 'who is driving on the policy holder's order or with his permission'.
>
> The appellants resisted the action on the ground that Chua at the time of the accident was not driving the car with Ah Bah's permission.

The Federal Court at p 281 held:

> On the facts and in the circumstances of this case where the insured in parting with the control of the car without any definite prohibition as to the nature of its use to a person, who thereupon uses it for a purpose for which he had used it on previous occasions with the insured's knowledge and without the insured's expressed disapproval, it must be held that the insured had given permission to that person to use the car for the purpose for which it had been used on previous occasions.

(b) *China Insurance Co Ltd v Ang Bay Kang* [1969] 1 MLJ 142 where the facts of the case as per the headnotes, inter alia, are:

One Madam Tay who was the owner of motorcar No SU 4191 sent her said car to a garage known as the Kim Seng Motor Engineering Co for repairs. The car was repaired by the said Quek Poh Khoon, an employee of Kim Seng Motor Engineering Co and after carrying out repairs Quek took the car out on the road to test it. Not far from the garage he collided with the plaintiff who was injured. The plaintiff brought an action for negligence against Quek and was awarded damages in respect of personal injuries in the sum of $12,657 and costs which were taxed at $2,463. The plaintiff then commenced these proceedings to recover from the defendant company the fruits of the judgment obtained by him against Quek on the ground that the defendant company was liable under the terms of the policy of insurance entered into by them with Madam Tay the owner of motorcar No SU4191. At the time of the accident there was in force in respect of motorcar No SU 4191 Policy No NT/MC 696379 issued to Madam Tay by the defendant company. The defendant company disclaimed liability on two grounds:

(1) At time of the accident the motorcar was not being used in connection with the business of the defendants' insured, Madam Tay, or with her permission.

(2) If contrary to the defendants' contention the said Quek Poh Khoon was driving with the permission of Madam Tay then the motor-car was used for a reliability trial, speed testing or for purposes in connection with the motor trade. The policy specifically stated that it did not cover use for a reliability trial, speed testing or use for any purpose in connection with the motor trade.

Counsel for the defendant company concedes that at the time of the accident the car was being tested on the road after repairs had been carried out at the garage and the only point to be decided is whether at the material time the policy covered the use of the motor-car in the circumstances mentioned.

Therefore the substantial question to be decided on the facts of this case, whether, at the time of the accident the car was in use for the policyholder's business or whether it was being used for a purpose in connection with the motor trade.

The Federal Court held at p 143 I right column — p 144A left column:

The point taken is of considerable importance, because every car, at some time or other, requires repairs, and invariably has to be tested on the road by the repairer to ensure that the car has been efficiently repaired and is in good running order. The question to be decided is whether the testing of a car on the road by a motorcar repairer after repairs have been carried out, is a use for a purpose in connection with the motor trade.

It seems to us to be obvious that every motorcar owner who sends his car to a garage for repairs wants to be sure that it is in good running order when he receives it back and for this purpose he gives, either directly or by implication, authority to the garage proprietor to test the car after repairs, and when the car is being tested on the road, it is being used for and on behalf of the owner i.e. the policyholder and therefore for the purpose of the policyholder, the

purpose being, as already stated, to make sure that it is in good running order. Such use, in our opinion, cannot be said to be a use 'for a purpose in connection with the motor trade'.

(c) *Yong Moi & Anor v The Asia insurance Co Ltd* [1964] MLJ 307 where as per the headnotes the facts are:

> In 1957 one Ho was the owner of an Austin motorcar in respect of which there was in existence an insurance policy issued by the insurers. On 6 October 1957, Ho lent his car to his cousin Woo to go to a wedding at Segamat. Woo left for Segamat later that morning with a number of friends including Yong Choy. In the course of the journey Woo had a headache and he asked Yong Choy to drive. Yong Choy proceeded to do so and shortly afterwards the car met with an accident in consequence of which Woo suffered injuries whereby he died. The appellants, the administrators of Woo's estate commenced proceedings against Ho and Yong Choy based on the alleged negligent driving of Yong Choy. These proceedings were discontinued against Ho but on 29 May1961 judgment was entered in favour of the administrators against Yong Choy for $2,800 under s 7 of the Civil Law Ordinance and $23,000 under s 12 of the same Ordinance. That judgment was not satisfied and accordingly the present proceedings were commenced against the insurers by virtue of s 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Ordinance. The insurers defended on the ground that Ho's policy did not cover any liability which might be incurred by Yong Choy. The section of the policy provided that the insurers 'will indemnify any person who is driving such motor car on the insured's order or with his permission' and it was the case for the respondents that Yong Choy was not entitled to such indemnity because at the material time he was not driving the motor car on the order or the permission of Ho, the insured.

On appeal by the administrators of Woo's estate against the decision of the trial judge who decided that there was no implied consent and gave judgment in favour of the insurers, the Federal Court at p 308 held:

> When Ho lent his car to the deceased all he knew was that it was for the purpose of taking the deceased and some other peopfe whose names he did not know to the wedding at Segamat. As there was no express prohibition by Ho of any particular individual driving the car the irresistible inference was that there was an implied consent to the car being driven by the deceased or any other member of the deceased's party who was a licensed driver.

(d) *Manap bin Mat v General Accident Fire & Life Assurance Corporation Ltd* [1971] 1 MLJ 134 where the Singapore Court of Appeal held in headnote 2:

> Throughout the conditions of this policy of insurance, 'insured' has to be read, so far as they can apply beyond the insured, as meaning 'insured or any other person who is insured' by virtue of the relevant clause in the policy.

(e) *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 where the

House of Lords held 'the facts and the actual conduct of the parties established the existence of the contract'.

(f) *Eckhardt Marine GMBH v Sheriff High Court of Malaya, Seremban & Ors* [2001] 4 MLJ 49; [2001] 3 CLJ 864 opined at p 50 (MLJ); p 869 (CLJ):

> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 is a case of acceptance by conduct.

[37] I find the driver of the said vehicle at the material time of accident, Wong Jun Kit of Perkhidmatan Tayar Teik Chan is (i) covered by cl 5(b) of exh P6 and P6A; (ii) based on the evidence of Encik Zazali Mohd Yatim (PW 2), that P6A which forms part of P6 covers loss or damage as specified in cl 1 of P6A which includes accidental collision and malicious act. In this case the evidence from PW1, Insp Hashimah (IO) is that Wong Jun Kit (DW2) was the driver of the said vehicle on 8 August 2007; Wong Jun Kit was charged on 2 September 2010 under s 41(1) of the Road Transport Act 1987; he was acquitted and discharged after a trial and there was no appeal. Based on the ordinary and natural meaning of 'accident', 'an unlooked-for mishap, or an untoward event which is not expected or designed' (see *Boyle v Wright* [1969] VR 699).

[38] Since Wong Jun Kit said driver is covered by cl 5(b) of P6 and occurrences as specified in cl 1 of P6A, *he is deemed to be an insured; hence the said insurer would not foe entitled to subrogation.*

(See (i) *Digby v General Accident Fire and Life Assurance Corp, Ltd* [1942] All ER 319 The TLR Vol Iviii - 1941–1942, 375 at pp 377, 378 and 380 where essentially, 'The identity of the insured may change'. In this instant case, by virtue of exh P6, the identity of the insured, Dato' Othman Hashim, may change because the policy states 'Any other person who is driving on the participant's order or with his permission';

(ii) *Principles of Insurance Law in Australia and New Zealand* (1991) Butterworths at pp 480, 490, 501) — 'The insurer's right of subrogation enables it to exercise the insured's rights against third parties. If the insured himself causes a loss, the insurer is not entitled to subrogation, simply because the insured has no rights against himself').

WHETHER THE PLAINTIFF BEING A HIRER AND THE SAID INSURED STEPPING INTO THE SHOES OF A HIRER HAS A VALID CLAIM AGAINST THE DEFENDANT

[39] The plaintiff, being the hirer has an insurable interest in law. However since there is an endorsement 'Hong Leong Bank Berhad' in the insurance

policy, I am of the view that the Bank would have co-extensive rights as against the insured. I draw support from s 26(1)(a) of the Hire Purchase Act 1967:

> (1) An owner shall cause to be insured in the name of the hirer —
>
> (a) motor vehicles comprised in a hire-purchase agreement, for the first year only; and ….

The phrase 'cause to be insured in the name of the hirer' has been interpreted in the case of *Malaysian Australian Finance Co Ltd v The Law Union & Rock Insurance Co Ltd* [1972] 2 MLJ 10 (HC). The respondent (insurers) issued a commercial vehicle of policy insurance to one Choong Kok Hing, the insured. The issue was whether the applicant/owner had rights co-extensive as the insured, in instituting claims in its own name against the insurers arising out of the loss of the subject matter upon which the coverage was provided by the insurers by virtue of an endorsement in the policy of insurance and it was answered in the affirmative by the court.

[40] Further, the plaintiff being only the hirer was in law a person who had possession and use of the said vehicle but was not the legal owner (see *Credit Corporationn (M) Bhd v The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 83 held 2; meaning of 'hirer' and 'owner' under s 2 of the Hire Purchase Act).

[41] The evidence showed that whilst the plaintiff has subrogated all his rights to the insurer (exh P3) there is no document or discharge by Hong Leong Bank releasing the plaintiff of all liability. The plaintiff said that he had made payment to EON Bank in respect of a hire purchase loan for the car; however no hire purchase agreement has been produced; there is no proof of payments being made under the hire purchase and neither is Zuraidah Atan called as a witness. Under the circumstances, the court is of the view that s 114(g) of the Evidence Act 1950 ought to be invoked and an adverse inference be drawn against the plaintiff for non-production of a material document and witness.

WHETHER THE PLAINTIFF'S CLAIM IS VOID FOR BEING IN CONTRAVENTION OF THE LAW

[42] Learned counsel for the plaintiff submitted the plaintiff was not an expert on car and had given a reasonable explanation as to why he did not register the change of engine because he did not completely install the engine of the said vehicle. The plaintiff further submitted 'Just because the change of engine has not been registered with the relevant authority does not make the whole claim illegal against the defendant' citing the case of *Sajan Singh v Sardara Ali* [1960] 1 MLJ 52.

[43] With regard to how the engine change was effected, I adopt what is alluded to in paras 9–9.6 above. There is evidence from the plaintiff and DW5 that the plaintiff had driven to and fro to the defendant's workshop for repairs.

[44] With respect to the said vehicle, in my judgment nothing turns on the fact that DW5 gave his opinion to the plaintiff to either repair, overhaul or change the engine as after all, DW5 was merely a mechanic and ultimately, the choice lies with the plaintiff, as the hirer to exercise the option. By no means can it be said that DW5 was in pari delicto.

[45] The certificate of insurance by Takaful Ikhlas bears an endorsement of 'Road Transport Act 1967' (exh P6A pp 8/16).

[46] Section 17(1)(b) of the Road Transport Act 1987, inter alia, reads:

> (1) A licensed registrar shall not be required to grant any motor vehicle licence for which application is made unless —
>
> (a) …
>
> (b) the identifying particulars of the motor vehicle, including the engine and chassis number, remain clear, distinct and untampered and are identical with the corresponding particulars contained in such registration certificate.

[47] Thus based on the evidence adduced it is clear that there the plaintiff has failed to comply with the requirement of s 17(1)(b) of the Road Transport Act whereby the engine number of the said vehicle must be identical with the corresponding particulars in the registration certificate. In this regard, I agreed with the defendant's submission that the plaintiff's claim ought not to be entertained. I draw support from the case of *Asia Insurance Co Ltd v American International Assurance Co Ltd* [1953] 1 MLJ 87. As per the headnotes, the facts of the case being, the plaintiffs claimed the sum of $60,131.60 on a policy of reinsurance of stocks of rubber belonging to Bian Hoe Co which was destroyed by fire. The plaintiff company had insured by fire policies of insurance the stocks of rubber for a total sum of $410,000 and had reinsured with the defendant company their liability under their fire policies for $97,500. The plaintiff company paid Bian Hoe the sum of $245,000 out of their total liability $410,000 and claimed the due proportion of their liability from the defendants. The defendants resisted the claim on several grounds including, that the plaintiff's were under no liability to their insured as their insured had no licence under s 211 of the Municipal Ordinance or under s 3 of the Rubber Dealers Ordinance. The court held that Bian Hoe had no licence for the storage of rubber and as they knew that they were committing an illegality in storing rubber without a licence, the defendants were not liable under their policies of insurance.

[48] The case of *Sajan Singh* relied on by the plaintiff can be distinguished. I agreed with Mr Ravin's submission that the said authority has to be seen in the context of the peculiar circumstances of the case 'where the Privy Council was faced with a situation of illegality committed by the seller and purchaser. The seller sold the lorry but the property still remained in his name and was considered illegal as the money was given to the seller. The seller is also going to enjoy the illegal act meaning to say he is not only going to keep the property, he is also going to keep the money'. At p 54 the House of Lords opined:

> Their Lordships would only add this: if the law were not to allow the plaintiff to recover in this case, it would leave the defendant in possession of both the lorry and the money he received for it. Their Lordships are glad to have been able to reach the conclusion that, on the *facts of the present case*, this is not the law. (Emphasis added.)

EVEN IF THE DEFENDANT IS NOT COVERED UNDER THE TAKAFUL INSURANCE POLICY, HAS THE DEFENDANT DISCHARGED THE BURDEN OF NOT BEING NEGLIGENT?

[49] The plaintiff submitted that the defendant was negligent as (i) the testimonies of DW2 and DW3 is inherently incredible as if the speed of 70–80 km per hour was true but was driving at high speed resulting in extensive damage and the said vehicle was considered a total loss by the insurers and (ii) the evidence of Insp Hashimah bte Hashim (PW1) that the accident occurred because 'the driver Wong Jun Kit (DW2) had driven at high speed and lost control hit the underpasss of Jalan Tun Razak'.

[50] I wish to make a correction to the learned plaintiff's counsel's submission in that PW1 in evidence-in-chief merely said 'Daripada siasatan yang dilakukan terdapat pemandu (Wong Jun Kit) motokar ketika melalui tempat kejadian telah gagal mengawal motokar yang dipandunya, dipercayai dipandu dengan kelajuan yang tinggi sehingga hilang kawalan menyebabkan bahagian belakang motokar tersebut telah berpusing lalu menghentam bahagian tengah konkrit terowong dilokasi kejadian'. Hence I find PW1 did not make a positive averment that the driver drove at a fast speed but 'hanya percayai'.

[51] Based on the evidence of DW2 and DW3 and their police reports, it is clear that the said vehicle was being tested and there were problems encountered. DW2 (Wong Jun Kit) in his police report (exh D12) stated 'Semasa saya masuk terowong di simpang Jalan Ampang/Jalan Tun Razak, saya rasa kereta itu bergegar dan gongcang' and amplified it to mean 'shaking' whilst DW3 said he heard 'Bunyi 'Grrrr' macam gegar kuat'.

[52] To reiterate, PW1 confirmed that DW2 was charged in the magistrate's court on 2 September 2010 under s 41(1) of the Road Transport Act 1987 and was acquitted and discharged and there was no appeal. No police sketch plan and key were produced. Therefore there is no reason for the court not to believe the testimonies of DW2 and DW3 that the speed was between 70–80 km per hour as they were not shaken during cross-examination.

[53] On a balance of probabilities, I find the plaintiff has not proven the defendant was negligent.

PARTIES' CLAIMS

[54] Based on the evidence adduced which I have alluded to, I find none of the plaintiff's claim can be allowed for lack of proof.

[55] Wong Kok Keong (DW5), with whom the plaintiff dealt with regularly said that in respect of the repairs, the plaintiff still owed him RM16,453.70 as at 31 August 2007. This was confirmed by Madam Kek Booi Choo (DW4) who produced the statement of account as at 31 August 2007 (exh D20) and stated a balance of RM16,453.70 was owed by the plaintiff to the defendant. In my judgment the breakdown of the said statement of account is verified by (i) the two invoices No 25718 dated 4 June 2007 and No 25784 dated 3 August 2007 (exh D17(A–E)) and (ii) exh D19(A–E) which according to DW4 were the receipts of payments for the two invoices. I find after the necessary deductions were made for payments by the plaintiff vide exh D19(A–E), it is correct that a balance of RM16,453.70 was still owing from the plaintiff to the defendant. Based on the documentary evidence, the plaintiff has made several payments (exh D16(A–E)) without any complaints and is now estopped from disputing the invoices (*Boustead Trading(1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 332.

CONCLUSION

[56] In the circumstances I find on a balance of probabilities:

(a) the plaintiff has not proven his claim and the plaintiff's claim is dismissed with costs to be taxed unless otherwise agreed; and

(b) the defendant has proven its counterclaim which is allowed with costs to be taxed unless otherwise agreed.

Plaintiff's claim dismissed with costs to be taxed or agreed and defendant's counterclaim allowed with costs to be taxed or agreed.

Reported by Kohila Nesan